Doug Wilson Enterprises, Inc. *and* United Brotherhood of Carpenters and Joiners of America, Local 1765, AFL–CIO. Cases 12–CA–20155 and 12–RC–8357

June 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On November 27, 2000, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Doug Wilson Enterprises, Inc., Cape Canaveral, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off, discharging, or otherwise discriminating against employees because of their union or other protected, concerted activities, or in order to attempt to mask the unlawful motive for such conduct.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer William Baumgardner and Mark Oropeza full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of William Baumgardner, Mark Oropeza, Michael Diamond, and William Mutter, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Make William Baumgardner, Mark Oropeza, Michael Diamond, and William Mutter whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(d) Preserve and, within 14 days of this request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Cape Canaveral, Florida, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 26, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held on June 11, 1999, in Case 12–RC–8357, is set aside and that

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d. Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge, in his recommended Order and notice, failed to set forth the full names of all discriminatees and failed to conform fully to the requirements set forth in *Indian Hills Care Center*, 321 NLRB 144 (1996). Accordingly, we have modified the Order and notice as necessary.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the case is remanded to the Regional Director of Region 12 for the purpose of conducting a new election.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT lay off, discharge, or otherwise discriminate against employees because of union or other protected, concerted activities, and WE WILL NOT discriminate against employees in order to attempt to mask the unlawful motive for such conduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer William Baumgardner and Mark Oropeza full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make William Baumgardner, Mark Oropeza, Michael Diamond, and William Mutter whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of William Baumgardner, Mark Oropeza, Michael Diamond, and William Mutter, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

DOUG WILSON ENTERPRISES, INC.

Michael Maiman, Esq., for the General Counsel.
Wayne Helsby, Esq., and *Paul Scheck, Esq. (Allen, Norton & Blue, P.A.),* for the Respondent.
James Harvey, Director of Organizing, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The original charge in Case 12–CA–20155 was filed on May 28, 1999,[1] by United Brotherhood of Carpenters and Joiners of America, Local 1765, AFL–CIO (the Union) and an amended charge on August 31. Complaint issued on February 28, 2000, and alleged that on May 26 Doug Wilson Enterprises, Inc. (Respondent or the Company), laid off Jay Baumgardner, Michael Diamond, William Mutter, and Mark Oropeza because they joined and assisted the Union and engaged in concerted activities, in order to discourage employees from joining the Union.

Pursuant to a Stipulated Election Agreement, in Case 12–RC–8357, a secret-ballot election was conducted among Respondent's voters in an appropriate unit on June 11. Of approximately six eligible voters, two cast votes for the Union, and three against it, with one challenged ballot. Accordingly, the Union did not receive a majority of the valid votes counted plus the one challenged ballot. The Union filed timely objections to the election, which inter alia alleged that Respondent terminated all bargaining unit employees on receipt of the petition. The cases were consolidated for hearing on March 20, 2000.

A hearing on these matters was conducted before me on May 8, 2000, in Cocoa, Florida. Thereafter, the General Counsel and Respondent filed briefs. On the basis of the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Florida corporation, with a place of business in Cape Canaveral, Florida, where it is engaged in the construction business. During the 12 months preceding issuance of the complaint, Respondent received at its Cape Canaveral facility and at other jobsites located in the State of Florida goods valued in excess of $50,000 directly from points outside the State of Florida. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Employment of Baumgardner and Oropeza

Respondent hired William Jay Baumgardner in May 1998. He testified that he was hired as a carpenter and did carpentry work. Company President Douglas Wilson testified that his employees were classified as "skilled labor" and did a variety of jobs, including sweeping the floor. The Stipulated Election Agreement describes the employees as "carpenters."[2]

Baumgardner's beginning wage rate was $8.50. A few months later it was raised to $10.59. He recommended Mark

[1] All dates are in 1999 unless otherwise specified.
[2] GC Exh. 3.

Oropeza to the Company, and the latter was hired in October 1998, without an interview upon filing an application.

Baumgardner and Oropeza thereafter worked as a team, and received many compliments from Wilson. There is no record of any oral or written discipline during their period of employment.

B. The Union Activity

In February 1999, union representatives approached employees at a jobsite and discussed the Union. In March Baumgardner and Oropeza joined the Union and signed union authorization cards. They were the only employees to do so. On May 20, Baumgardner and Oropeza were working at a jobsite where, they testified, Mike Hilligoss was the company superintendent. On that day, May 20, the Union filed its petition in the representation case. On the next day, May 21, Baumgardner and Oropeza showed their authorization cards to Hilligoss and told him that they supported the Union. Oropeza wore a union shirt.

Baumgardner and Oropeza testified that Hilligoss was the highest ranking company official on the jobsite, and was "the boss." They could not leave the jobsite during working hours without his permission. He dealt with subcontractors, and worked about 1 percent of the time with tools of the trade. He sent Baumgardner and Oropeza to Home Depot for supplies.

Company President Wilson testified that he ran numerous projects at the same time. In the office were "project managers" who spent time on the telephone bidding on new jobs. "Superintendents" and "skilled labor" were at the jobsites. The "skilled labor" floated from jobsite to jobsite depending on need. A superintendent would call a project manager and state that he needed help. The project manager would then arrange to have an employee from another site transferred.

Wilson discussed "superintendents" and "crew leaders." He stated that "superintendent" could hire and fire, that they worked with the architects, and could make certain changes in plans. "Crew leaders," also called "lead men" could not hire or fire without the approval of the project manager. Wilson stated that Hilligoss was a leadman.

In response to the General Counsel's subpoena, Respondent supplied a list of all personnel with job descriptions. That document lists Mike Hilligoss as a superintendent.[3] The Stipulated Election Agreement lists all eligible voters and excludes supervisors.[4] Hilligoss is not listed as an eligible voter.

C. The Layoffs of Baumgardner and Oropeza

Five days after the disclosure to Hilligoss, Baumgardner and Oropeza were working at the "MRI" jobsite. Baumgardner was installing floorboards. At about 1 p.m., Wilson came to the jobsite. This had never occurred prior to this time. He had a conference with Hilligoss, and returned at about 2 p.m. He approached the employees and told them that they were being laid off due to lack of work. Baumgardner asked, "What about the work I'm doing now?" Wilson told him to get his tools and get off Wilson's property. Wilson was very nervous, and his hands were shaking. He handed the employees a document stating that they were being laid off due to lack of work, and paid them each with checks up to the date of layoff. Neither employee has been recalled.

D. The Layoff and Recall of William Mutter and Michael Diamond

Respondent laid off other employees on May 26 for the same asserted reason, lack of work, or, as Wilson put it, the failure to get enough new jobs. The complaint alleges that two of these layoffs, those of Mutter and Diamond, were discriminatorily motivated. Mutter had been working on the same project with Baumgardner and Oropeza. He was recalled to the same job on the payroll ending June 8, just a few days after his layoff. Wilson's explanation was that MRI, a health care facility, wanted an office for a new doctor and Mutter was on that job for a week. On the following week, according to Wilson, Mutter was employed on a new project. Wilson also recalled Michael Diamond. His reason, Wilson stated, was that one project was running ahead of schedule, and they brought Diamond back to help install forms around the ground floors. Wilson asserted that he used seniority and performance as criteria in his selection of employees for recall.

E. Respondent's Additional Reasons for the Layoff of Baumgardner and Oropeza

In early 1999, Oropeza, prior to the time they signed union authorization cards, and Baumgardner were working on a Friday in a "clean room" at Cape Canaveral. The workday ran from 7 a.m. until 3 p.m. After they got started, the NASA administrator informed Respondent that they were creating too much dust, and that the work had to stop. They were informed of this fact by Bill Cross, Respondent's supervisor on the project. Cross gave them their paychecks for the pay period. Baumgardner and Oropeza gathered up their tools and equipment, and checked out through security. Tim Sanders, a supervisor for Respondent, testified that Bill Cross was told to direct the employees to another project. When they did not appear, Sanders asserted that Cross was called to verify that he had transmitted this order, and Cross did so. Baumgardner and Oropeza denied that Cross had given them any such order. Cross did not testify.

Baumgardner and Oropeza then decided to quit work for the day. They went to a local establishment that served food and beer. Tim Sanders came in, and testified that he saw a pitcher of beer and glasses on the employees' table. He told the employees to report to Wilson's office the following Monday. They did so, and the meeting was attended by Wilson, Sanders, Baumgaredner, and Oropeza. Wilson told them that they could have checked with the office by using their mobile phones to determine whether they were needed elsewhere. The employees agreed, and apologized for not calling in. Sanders apologized for his actions in the restaurant. There is no evidence that Baumgardner or Oropeza received oral or written discipline as a result of this incident.

Company President Wilson gave an extended rationale for the layoffs in May. He concluded in April that the Company was not acquiring enough new jobs to sustain his payroll. He then had about 12 employees and decided to layoff 7. Actually, Wilson laid off five, five of them alleged. Of these, only

[3] GC Exh. 8.
[4] GC Exh. 3.

Baumgardner and Oropeza had engaged in union activity. Mutter and Diamond, were recalled. The fifth employee, who was laid off on May 26, was also recalled. Union Official Robert McCoy testified that he investigated the number of Respondent's jobs since the time of the June election. Respondent's practice was to place a company sign or a dumpster with the company name on it at jobsites where it was working. McCoy submitted pictures of some of these jobsites.[5]

At the hearing, Wilson advanced additional reasons for the layoffs of Baumgardner and Oropeza. Thus, they did not get along with other employees, had alcohol on their breath at times, made racial slurs, and falsified time reports. Wilson agreed that none of these allegations is made in an affidavit, which he submitted in response to an investigatory subpoena, and the employees denied them.

F. Factual and Legal Conclusions

The General Counsel has the burden of establishing a prima facie case that is sufficient to warrant an inference that protected conduct was a motivating factor in an employer's decision to discipline an employee. Once this is established, the burden shifts to the Respondent to demonstrate that the discipline would have been administered even in the absence of the protected conduct. The General Counsel must supply persuasive evidence that the employer acted because of antiunion animus.

It is undisputed that Baumgardner and Oropeza joined the Union and signed union authorization cards. There is also no dispute that they showed the union cards to Michael Hilligoss on May 21, the day after the Union filed its petition in the representation case. There is also no dispute that Respondent laid them off 5 days later, on May 26, and has not recalled them.

Respondent gave a variety of reasons for the layoffs. The first reason was lack of business. This reason is not persuasive. Two other employees who had not engaged in union activity were laid off at the same time, but were both recalled, one within a few days to the same job on which Baumgardner and Oropeza had been working. A union agent observed and took photographs of various construction sites, which had Respondent's sign or a Dumpster after the layoffs. There was no advance notice of the layoffs, contrary to Respondent's custom.[6] Wilson showed up at the jobsite and had a consultation with Hilligoss, contrary to his usual custom. When Baumgardner was told that he was being laid off because of lack of work, he asked about the work in which he was then engaged. Wilson told him to get off Wilson's property.

At the hearing Wilson added new reasons—failure to get along with other workers, alcohol on their breath, racial slurs, and falsification of records, reasons which he had failed to enumerate by a prior affidavit. The incident where Baumgardner and Oropeza left the job at Cape Canaveral on midday because they were causing dust had no probative value. The supervisor who assertedly told them to report to another job was not called as a witness. In any event, apologies were exchanged in a meeting with the company president, and no oral or written discipline was administered.

In order to establish that an employer disciplined an employee because of union activity, the General Counsel must prove that the employer had knowledge of that activity. The Board has inferred employer knowledge in various circumstances, such as cases where the employee attended a union meeting or wore distinctive union insignia.[7] Baumgardner and Oropeza attended a union meeting, and wore a union shirt.

The General Counsel argues that Michael Hilligoss was an agent of Respondent, based on his dealings with subcontractors and his purchase of supplies on the employer's behalf. Accordingly, the employees' notification to Hilligoss of their union allegiance constituted notice to respond.[8] There is no doubt that Hilligoss engaged in these activities and manifested apparent authority from Respondent to do so. The General Counsel argues that this authority was manifested to the employees as well as the subcontractors and suppliers. Section 2(2) of the statute includes in the definition of "employer" any person acting as an agent of the employer. On this reasoning, when the employees notified Hilligoss of their union activities, they were notifying the employer.

And, finally, there is the testimony of the employees that Hilligoss was "the boss," the top official at the jobsite, and that they could not leave without his permission. Company President Wilson defined Hilligoss as a leadman. It is difficult to credit this testimony in light of the fact that Respondent's own personnel records list Hilligoss as a superintendent. Wilson testified that superintendents had authority to hire and fire.

Hilligoss was not called as a witness, and I infer that he would have testified adversely to Respondent's cause if he had been called.

On the basis of the foregoing reasons, I conclude that Respondent had knowledge of Baumgardner's and Oropeza's union activities.

I further conclude that Respondent's reasons advanced for the layoffs of Baumgardner and Oropeza, stated above, are implausible or contradicted by other believable evidence. I therefore find that they are pretexts. The Company's submission of shifting and pretextual reasons for these layoffs warrants an inference that the real reason was something other than that stated by Respondent. The court of appeals for the Eighth Circuit has stated "both implausible explanations or false and shifting reasons support a finding of illegal motivation (authorities cited). Where an employer's explanation fails to withstand scrutiny, it is considered pretextual and buttresses the General Counsel's prima facie showing of unlawful discrimination." *York Products v. NLRB*, 132 LRRM 2030, 2033 (8th Cir 1989).

Other evidence of Respondent's unlawful motivation is the fact that the layoffs took place only 5 days after the employees notified Respondent of their union activities. In a case where the employer discharged employees 9 days after the advent of

[5] GC Exhs. 17 and 23. Some of the jobsites are those of the Sun Trust Bank, the Cocoa Beach Chamber of Commerce, the Ashburny Arms Hotel, and the United Methodist Church.

[6] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981); approved *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Manno Electric*, 321 NLRB 278 fn. 12 (1996).

[7] The Developing Labor Law, 3d Ed. (ABA Section of Labor and Employment Law, 1988) p. 113.

[8] GC Br., 5.

the union movement, the Court of Appeals for the Second Circuit deemed the "stunningly obvious timing of the layoffs," in addition to other evidence to be sufficient to warrant an inference of unlawful motivation. *NLRB v. Novelty Products Co.,* 424 F.2d 748, 750 (2d Cir. 1970).

Respondent's departure from its custom of giving advance notice of pending layoffs is further evidence of its illegal motivation. Wilson simply showed up at the jobsite without notice, and told the employees to get off his premises.

I conclude that Baumgardner and Oropeza were laid off on May 26, because of their union activities, in violation of Section 8(a)(3) and (1).

With respect to Michael Diamond and William Mutter, who did not engage in union activities, the General Counsel argues that Respondent laid them off in order to legitimize the layoffs of Baumgardner and Oropeza, and thus to defeat the union movement.[9] Since Baumgardner and Oropeza were proponents of the Union, their departure would tend to reduce the chances of a successful union campaign. However, the departure had to be "legitimate" in order to be successful. The layoffs of Diamond and Mutter for the same asserted reason, lack of work, would tend to support that reason. However, the reason was pretextual. As the Eighth Circuit has stated, "implausible explanations and false or shifting reasons support a finding of illegal motivation." *York Products*, supra. The only possible motive Respondent could have had for the layoffs of Diamond and Mutter was to make it appear that the "lack of business" reason was valid. The layoffs of Diamond and Mutter thus supported the unlawful layoffs of Baumgardner and Oropeza, and were themselves unlawful.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. Respondent Doug Wilson Enterprises, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Brotherhood of Carpenters and Joiners of America Local 1765, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off William Jay Baumgardner and Mark Oropeza on May 26, 1999, because they engaged in union activities, and by laying off Michael Diamond and William Mutter on the same date to legitimize the pretextual reason advanced for the layoffs of Baumgardner and Oropeza, Respondent violated Section 8(a)(3) and (1) of the Act.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

It having been found that Respondent engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent unlawfully laid off William Jay Baumgardner and Mark Oropeza on May 26,1999, I shall recommend that Respondent be required to offer them immediate reinstatement to their former positions, dismissing if necessary any employees hired to fill those positions, or, if those positions do not exist, to substantially equivalent positions, and to make them whole for any loss of earnings they may have suffered by reason of Respondent's unlawful conduct by paying each of them a sum of money equal to the amount he would have earned from the date of his layoff to the date of an offer of reinstatement, less net earnings during such period, to be computed in the manner established by the Board in *F. W. Woolworth Co.,* 90 NLRB 289 (1950) with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[10] I shall recommend that Respondent be required to remove from its records all references to its unlawful layoffs found and inform each of the employees in writing that it has done so and that the layoffs will not be used as the basis of any future discipline.

I shall also recommend that Respondent be required to make Michael Diamond and William Mutter whole for any loss of earnings they may have suffered by reason of Respondent's unlawful conduct in the manner set forth above.

The Union's objection to the unlawful termination of bargaining unit employees is sustained by the record, and warrants setting aside the election.

[Recommended Order omitted from publication.]

[9] GC Br., p. 9.

[10] Under *New Horizons***,** interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in 26 U.S.C. § 6621. Interest accrued before January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp***.,** 231 NLRB 651 (1977).